
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE GREAT FALLS NATIONAL BANK (a Corporation),

Appellant,

vs.

CHARLES D. McLURE, THE DIAMOND R MINING COMPANY (a Corporation), and A. W. MERRIFIELD, United States Marshal for the District of Montana,

Appellees.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court
for the District of Montana.

FILED

SEP 23 1907

No. 1496

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*In the Circuit Court of the United States, Ninth
Circuit, Within and for the District of Mon-
tana.*

GREAT FALLS NATIONAL BANK (a Corpora-
tion),

Complainant,

vs.

CHARLES D. McLURE, DIAMOND R MINING
COMPANY (a Corporation), and A. W.
MERRIFIELD, United States Marshal for
the District of Montana,

Defendants.

Stipulation of Counsel Under Rule 23.

It is hereby stipulated by and between the appel-
lant and appellees that in the printing of the record
the clerk of the Court may omit therefrom the in-
ventory of loose personal property which is a part
of Exhibit "AA," attached to the bill of complaint,
leaving the printed record to consist of the following
papers, to wit: Bill of complaint (with that portion
omitted as above mentioned), the demurrer of the
defendants, petition for allowance of appeal and or-
der granting same, assignment of errors and prayer
for reversal, bond on appeal, citation on appeal and
certificate of Clerk. After bill of complaint title of

court and cause may be omitted, and in lieu thereof insert "Title of Court and Cause."

A. C. GORMLEY,
Solicitor and Counsel for Appellant.

IRA T. WIGHT,
Solicitor and Counsel for Appellees.

To the Clerk of the United States Court of Appeals
for the Ninth Circuit.

You will please print the record in the case above-entitled pursuant to the foregoing stipulation.

A. C. GORMLEY,
Solicitor and Counsel for Appellant.

[Endorsed]: No. 815. United States Circuit Court, Ninth Circuit, District of Montana. Great Falls National Bank, Complainant, v. Charles D. McLure, et al., Defendants. Stipulation Under Rule 23. Filed and Entered Aug. 23, 1907. Geo. W. Proule, Clerk. A. C. Gormley, Attorney for Compl.

No. 1496. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 31, 1907. F. D. Monckton, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

No. 815—IN EQUITY.

GERAT FALLS NATIONAL BANK (a Corporation),

Complainant,

v.

CHARLES D. McLURE et al.,

Defendants.

Caption.

Be it remembered, that on the 25th day of February, A. D. 1907, the complainant filed its bill of complaint herein, which said bill of complaint is entered of final record herein as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, Within and for the District of Montana.

GREAT FALLS NATIONAL BANK (a Corporation),

Complainant,

v.

CHARLES D. McLURE, DIAMOND R MINING COMPANY (a Corporation), and A. W. Merrifield, United States Marshal for the District of Montana,

Defendants.

Bill of Complaint.

To the Honorable, the Judges of the Circuit Court of
the United States, for the District of Montana,
in Equity Sitting:

Comes now the complainant above named, Great Falls National Bank, a corporation, and brings this, its bill of complaint, against the above-named defendants, Charles D. McLure, a citizen of the State of Missouri, the Diamond R Mining Company, a corporation, and A. W. Merrifield, United States Marshal for the District of Montana, whereupon your orator complains and says:

1. That the complainant, the Great Falls National Bank, is a corporation duly organized and existing under and by virtue of the national banking laws of the United States, and doing business as such in the city of Great Falls, county of Cascade and State of Montana.

2. That the defendant, Diamond R Mining Company, is a corporation organized and existing under and by virtue of the laws of the State of Montana, and holding and owning certain property in the county of Cascade and State of Montana.

3. That the defendant, A. W. Merrifield, is the duly appointed, qualified and acting United States Marshal in and for the District of Montana, and that as such officer, under and by virtue of the writ of

execution issued out of this court in the action of Charles D. McLure vs. Diamond R Mining Company, defendant, and hereinafter referred to, he has advertised the property hereinafter described for sale at Neihart, Cascade County, Montana, on the 26th day of February, 1907, and is threatening to sell said property at said time and place.

4. That on the 14th day of December, 1901, the defendant, Charles D. McLure, then and at all times a nonresident of the State of Montana, and residing in the city of St. Louis, in the State of Missouri, instituted an action in this court in the city of Helena, County of Lewis and Clark, and State of Montana, as plaintiff against the above-named Diamond R Mining Company, as defendant, and on said date there was issued out of said court a writ of attachment in said cause, directed and delivered to the United States Marshal for the District of Montana for service; that in pursuance of said writ of attachment said United States Marshal filed a notice of attachment with the County Clerk and Recorder of the county of Cascade and State of Montana, on the 16th day of December, 1901, thereby levying upon certain real estate in said Cascade County belonging to said defendant, Diamond R Mining Company, and described in said notice, and did also, in pursuance of said writ, on the 18th day of December, 1901, attach and levy upon certain personal property be-

longing to said defendant company in said county, by taking possession thereof and placing one John L. Tripp in charge thereof as keeper, said Tripp being an employee of said defendant company; for a full and complete description of the property aforesaid reference is hereby made to the list hereto attached, marked Exhibit "AA," and made a part hereof; that the invoice of loose personal property referred to in said exhibit as Exhibit "B," constitutes the machinery, tools, etc., in the concentrator building, power-house and buildings at the mine referred to in Exhibit "A" thereof; that the defendant, Diamond R Mining Company, had not then, nor has it now, any other property than the said property so attached; that summons in said action was served upon L. S. McLure, as president of the said Diamond R Mining Company, and on the 16th day of January, 1902, a judgment by default was entered in said cause in the city of Helena, Lewis and Clark County, Montana, in favor of the said Charles D. McLure, as plaintiff, and against the said Diamond R Mining Company, as defendant, for the sum of eighty-six thousand one hundred eighty dollars (\$86,180.00) and fifty-three dollars and thirty cents (\$53.30) costs; that the plaintiff therein, Charles D. McLure, never at any time caused or requested a writ of execution to be issued out of this court until on, to wit, the 10th day of January, 1907, two days after the fil-

ing of complainant's original petition in intervention therein, nor has he at any time directed or requested said United States Marshal, or any other officer, to do anything further in said cause since the service of said writ of attachment as aforesaid, and no further levy has been made or lien acquired since the service of said writ of attachment; that the said defendant has, by his laches and unreasonable delay, waived, abandoned and lost whatever lien he may have had or claims upon said property.

5. That on the 17th day of December, 1901, the complainant herein commenced a certain action in the District Court of the Eighth Judicial District of the State of Montana, in and for the county of Cascade, being numbered 3876 on the records of said court, against the said Diamond R Mining Company, a corporation, as defendant, by the filing of a complaint therein; that immediately after the filing of said complaint and the issuance of a summons thereon, this complainant, as plaintiff in said action, also made and filed an affidavit of attachment in due form, as required by section 891, and also furnished and filed an undertaking on attachment in due form, with two sufficient sureties, approved by the Clerk, as required by section 892, of the Code of Civil Procedure of the State of Montana, and thereupon a writ of attachment was duly issued out of said court in said cause, and directed to the sheriff of the said

county of Cascade and State of Montana, as provided by section 893, of the Code of Civil Procedure of the State of Montana, and the same was thereupon placed in the hands of said sheriff for service, and the said sheriff did duly serve said writ on the 17th day of December, 1901, by levying upon, all and singular, the same and identical real estate and appurtenances aforesaid, including the concentrator building, power-houses and all other buildings situate upon and appurtenant to said real estate, together with all machinery and tools of every kind therein, and as particularly described in said Exhibit "AA," herein referred to, the sheriff of Cascade County making the levy as aforesaid upon said real estate by filing with the County Clerk and Recorder of said county on said date a copy of the said writ of attachment, together with a description of the said property attached, and a notice that it is attached, all as provided in section 895, of the Code of Civil Procedure of the State of Montana; and the said sheriff making his levy upon all the personal property by taking possession thereof simultaneously with the said United States Marshal, but said possession having been thereafter surrendered by reason of the interference and obstruction of the said marshal, and the said Tripp continued to hold possession of all said property; that after the due service of summons in said cause upon said defendant, a

judgment in due course was duly given, made and entered in said cause in favor of the complainant, as plaintiff, and against the said defendant, for the sum of twenty-five thousand three hundred four dollars and eighty-four cents (\$25,304.84.) and thirty-seven dollars and seventy cents (\$37.70) costs, which judgment was thereupon duly docketed in the office of the clerk of said court; that no part of said judgment has been paid, and the whole thereof is still a valid and subsisting indebtedness from the said defendant to the said plaintiff, the complainant herein; that the complainant has been and still is prevented from realizing the fruits of its said judgment by reason of the acts of the defendant, Charles D. McLure, herein complained of.

6. That the said judgment in favor of the complainant and against the said defendant, Diamond R Mining Company, aside from two claims assigned to the complainant, amounting to three thousand two hundred sixty-one dollars and thirty-seven cents (\$3,261.37), was based upon certain promissory notes, given and executed by the defendant company on April 15th, 1900, May 10th, 1900, June 1st, 1900, and June 15th, 1900, all payable on demand, in consideration of money advanced by complainant to defendant on said respective dates; that at the time said moneys were so advanced, and during all the times herein stated, one L. S. McLure, brother of

the defendant Charles D. McLure, was the general manager and a director of the said Diamond R Mining Company, and in personal charge of its affairs, and ever since the 12th day of June, 1900, has also been the president of said company, and was also, at all the times herein stated, the agent and representative of the defendant herein, Charles D. McLure, who was residing in the city of St. Louis, State of Missouri, and said Charles D. McLure was also a director in said company until the 9th day of October, 1900; that said Charles D. McLure and L. S. McLure were, at all the times herein stated and still are, the largest stockholders of said company and owned and controlled, and still own and control, a majority of the capital stock thereof; that during said time the said Diamond R Mining Company was building and constructing a concentrator at its mine in the town of Neihart, Cascade County, Montana, and that the moneys borrowed from the complainant as aforesaid were requested by the defendant company for the purpose of meeting urgent current expenses of the said defendant in connection with said work; that the complainant refused to loan any money whatsoever to the defendant company except upon the understanding that the said Charles D. McLure would immediately repay the same in preference to any other indebtedness of the said Diamond R Mining Company and before any of said moneys were so

advanced, and a part of the consideration therefor, it was so understood and agreed that the said Charles D. McLure would repay the same to the complainant as aforesaid, and fully protect the complainant against any loss or damage as the result of said loans to the said defendant company; that some time subsequent to the advancement of said sums, aggregating twenty thousand dollars (\$20,000.00), the petitioner demanded payment thereof from the said Charles D. McLure, and he promised to pay the same, but notwithstanding the aforesaid facts and circumstances, whereby the complainant was led to believe, and did believe, that it would not be obliged to bring suit by attachment or otherwise to enforce the payment of said indebtedness, the complainant knowing at all times that the said Charles D. McLure was the only other large creditor of the defendant company, the said Charles D. McLure did, nevertheless, institute the aforesaid action and, as hereinbefore set forth, levy upon and attach all the property of every kind and character belonging to the said defendant, Diamond R Mining Company; that the said attachment by the defendant herein, Charles D. McLure, as plaintiff in said cause, was not sought or made in good faith, as stated in his affidavit therefor, but was made and the said action prosecuted and judgment thereafter taken for the express purpose of hindering, delaying and defrauding this complainant and

other creditors out of their claims and demands, and the said proceedings will have the effect so intended unless set aside by this court.

7. That a concentrator of one hundred (100) tons daily capacity had been completed by the defendant, Diamond R Mining Company, on or about the —— day of——, 1900, for the purpose of concentrating its ores; that said concentrator had been operated successfully and profitably in concentrating the ores on the dump of the mine of the said defendant company, and that said concentrator had been erected for the purpose of concentrating the ores that would thereafter be extracted from the defendant company's said mine, and this was so understood by the complainant when it loaned the sums of money aforesaid; that after the completion and successful operation of said one hundred ton concentrator, the said Charles D. McLure and L. S. McLure, controlling the affairs of the company as aforesaid, proceeded to enlarge said concentrator so as to make the same have a capacity of three hundred tons of ore daily, and which was done at an additional cost and expense of about one hundred thousand (\$100,000.00) dollars (most of which was advanced by said Charles D. McLure, one of the defendants herein, and embraces the moneys sued for in the aforementioned action), that the company voted to enlarge said concentrator and to borrow said money under the prom-

ise and agreement of said Charles D. McLure that he would consolidate the Broadwater Group of mines, then owned by him, with the mines of said company, but which promise and agreement he has never kept, and there has thereby been a failure of consideration for the notes sued on by said Charles D. McLure, plaintiff in said action; that the said concentrator, after successfully treating the ores on the dump of said company, as aforesaid, was thereafter used by said Charles D. McLure for his sole benefit in concentrating ores from his said Broadwater Group of mines under a contract of seventy-five (75¢) cents per ton, which was a loss to said company, instead of being used to treat the ores from the company's mine as originally intended; that notwithstanding that the said concentrator was reasonably worth the sum of one hundred seventy-five thousand (\$175,000.00) dollars, if the same were to be kept in operation in pursuance of the original plan, and notwithstanding also that the mining claims and property of the defendant company were, taken in connection with the concentrator, then and there reasonably worth the sum of five hundred thousand (\$500,000.00) dollars and could have been worked and operated at a profit, all of which was well known to them, the said Charles D. McLure and L. S. McLure, acting in collusion for the purpose of cheating and defrauding the complainant and other creditors,

as well as the minority stockholders of the defendant company, closed down the said concentrator and failed and refused to open up the defendant company's mine, and at once instituted the aforesaid action and levied upon and attached all of the defendant company's said property.

8. That on the 9th day of February, 1903, one George F. Bartlett recovered a judgment and decree against the said Diamond R Mining Company in the District Court of the Eighth Judicial District of the State of Montana, in and for the county of Cascade, for the sum of fifteen hundred twenty-nine dollars and ninety cents (\$1529.90) and under and by virtue of said judgment, the sheriff of Cascade County, Montana, did, on the 20th day of April, 1904, sell lots numbered 1, 2, 3 and 4 in block numbered 2 in the original townsite of Neihart, Montana, as platted by Frank P. Atkinson, trustee, upon the surface of the Frisco Lode Mining Claim, the said lots embracing the parcel of ground upon which the first part of the defendant company's said concentrator was erected and the judgment aforesaid, upon which the same was sold, being by virtue of the foreclosure of a mechanic's lien upon the same; that the defendant herein Charles D. McLure and his brother L. S. McLure, acting collusively and fraudulently as aforesaid, took no steps whatsoever to redeem said property for the company or to protect the interest of

the stockholders or creditors thereof, but on the 23d day of March, 1905, the defendant herein, Charles D. McLure, redeemed the said land and premises from said sale for himself by paying to the said sheriff for the purchaser, the sum of nineteen hundred thirty dollars and twenty-five cents (\$1930.25), which was then and there due, said defendant effecting said redemption as the owner of the judgment recovered in the aforesaid action in this court; that thereafter, to wit, on the 2d day of January, 1906, upon application of the said defendant, Charles D. McLure, the sheriff executed to him a deed for said land and premises; that by reason of the said foreclosure proceedings instituted by said George F. Bartlett and the sale of the said premises thereunder, and the redemption by the said defendant, Charles D. McLure, the said defendant thereby became vested with the legal title to that portion of the concentrating plant of the defendant company which had originally been constructed at a cost of \$75,000.00; that under and by virtue of the provisions of section 1236 of the Code of Civil Procedure of the state of Montana, the said defendant, Charles D. McLure, plaintiff in said action, would not have permitted this complainant, or any other redemptioner, to redeem from him except by paying the amount so paid by the defendant herein as aforesaid, and also the amount of defendant's said judgment,

to wit, \$86,180.00, with interest thereon from the date thereof; that this prejudice and damage to complainant has resulted because of said defendant's delay and laches in not having execution issued upon his judgment in the aforementioned action.

9. That, as complainant is informed and believes, the plaintiff in said action, Charles D. McLure, one of the defendants herein, and his brother, L. S. McLure, the president and manager of the defendant company, were acting in collusion and in fraud of the rights of the complainant and other creditors of the defendant company when they created the indebtedness for enlarging the concentrator, when they closed down the defendant company's concentrator and failed and refused to open its mines, and when the aforesaid attachment suit of the defendant herein, Charles D. McLure, plaintiff in said action, was instituted and judgment by default taken after service upon said L. S. McLure, and also when they delayed for five years to take any steps whatever to sell the property held under said attachment, leaving this property during all said time in the custody of their said employee, John L. Tripp; that they also acted in collusion and with the same fraudulent purpose and design in making no reasonable effort to pay the said claim of George F. Bartlett and in permitting the sale of said land and premises to satisfy his said judgment, and in effecting the redemption of said

property in the manner aforesaid, to the great damage, loss and injury of this complainant and other creditors as well as the minority stockholders of the defendant company; that by reason of all the acts aforesaid, the said attachment lien and also the judgment in said cause should be held fraudulent and void as to this complainant.

10. That, as hereinbefore set forth, the property attached in said cause consists of the defendant company's mines, and also the flumes, pipes, cars, blacksmith-shop, concentrating mill and other machinery and tools used in working the same; that the value of the same, owing to its peculiar nature, is dependent upon its being kept together and used and operated as one plant; that while the said property and the different portions thereof had the values hereinbefore mentioned at the time of said defendant's said attachment on the 16th day of December, 1901, yet owing to the fact now that the said defendant has, in the manner hereinbefore set forth, acquired the legal title to a portion of the concentrating plant, the remaining portion thereof has necessarily depreciated in value in a sum far greater than the value of the portion thus segregated; that since said attachment, said defendant, Charles D. McLure, by keeping said John L. Tripp in the possession and control of said property, both real and personal, under said attachment, has deprived the said Diamond R Min-

ing Company and its stockholders of the possession, use and enjoyment of all said property and its mines have suffered great and irreparable damage and injury by disuse and neglect during said period of time; that there has also been a natural depreciation in value of the portion of the concentrating plant remaining, and all the machinery and tools connected therewith, since said attachment; that the defendant company is insolvent and that all said attached property is not now of sufficient value to more than satisfy defendant's said judgment; that the excessive attachment made in said action, and especially when taken in connection with the property acquired by defendant, Charles D. McLure, by virtue of his redemption, as a judgment creditor, should and does, in fact, amount to a satisfaction of his said judgment therein; that in any event, even though a valid lien were obtained in the first instance by said defendant under his said attachment, and even though the judgment of said defendant should not be deemed satisfied by reason of his acts as aforesaid, nevertheless the said defendant, Charles D. McLure has been guilty of such unreasonable delay and laches in failing to have a levy and sale made under execution upon said judgment, as to constitute a waiver and abandonment of his said pretended lien, and that the same should in equity be postponed and subordinated to the attachment lien of the complainant as hereinbefore set forth.

11. That the complainant, with leave of court, filed its petition in intervention in the aforementioned cause on the 8th day of January, 1907; that, thereafter, to wit, on the 10th day of January, 1907, the plaintiff in said action, Charles D. McLure, one of the defendants herein, caused a writ of execution to be issued out of this court upon his said judgment, including also \$——, costs, claimed as keeper's charges, but nothing has been done thereunder; that on the 12th day of January, 1907, complainant caused a writ of execution to be issued out of the State Court upon its said judgment, and delivered same to the sheriff of Cascade County for service; that in pursuance thereof, said sheriff levied upon all the personal property of the defendant by delivering a copy of said writ of execution, together with a notice to said John L. Tripp, who was then and there in possession and control of the same, stating that all personal property in his possession and under his control belonging to the defendant company was attached in pursuance of said writ as provided by section 895 of the Code of Civil Procedure of Montana; that said sheriff is unable to proceed further with the service of said writ of execution on account of the pretended lien of the said defendant, Charles D. McLure, upon said property; that on the —— day of January, 1907, the complainant herein, with leave of court, filed in this court its

amended and supplemental petition in intervention, in the aforementioned action, setting forth the facts substantially as above, and thereafter, to wit, on the 2d day of February, 1907, on motion of the plaintiff in said cause, Charles D. McLure, one of the defendants herein, the said amended and supplemental petition was by the Court dismissed; that the complainant has no plain, speedy or adequate remedy at law, and is relievable only in a court of equity; that if a sale is had of said property under the said writ of execution issued out of this court, in the said action of Charles D. McLure, plaintiff, vs. Diamond R Mining Company, defendant, and a certificate of sale or deed is issued to the purchaser at said sale, the same will constitute a cloud upon the title to said property and the rights of the complainant thereto and will cause great and irreparable injury to the complainant and all other creditors similarly situated.

12. That on account of the attachment sought to be made by said defendant, Charles D. McLure, as plaintiff in said action, through the writ issued out of this court in said cause, and on account of the writ of execution issued out of this court on the 10th day of January, 1907, after the filing of complainant's original petition in intervention in said cause, whereby the plaintiff therein, Charles D. McLure, defendant herein, is threatening to sell all of said property, and in order to prevent any conflict between this court and the State court over the con-

troverſy involved herein, the complainant comes into this court with this, its bill of complaint, and asks the permission of this court to proceed under its execution iſſued upon its ſaid judgment in the State court and levy upon and ſell all the property of the ſaid defendant company, or ſo much thereof as may be neceſſary to ſatisfy its demand; that if the defendant, Charles D. McLure, is permitted to levy upon and ſell ſaid property under execution great and irreparable damage will be done complainant and other creditors of the defendant company.

In conſideration whereof, and for as much as complainant is without full and adequate remedy in any other court and is relievable only in this court, where alone the wrong done, as well as the injury threatened, may be remedied or prevented, the complainant prays that upon conſideration of this, its bill of complaint, it may pleaſe the court and your Honors to permit the complainant, or the proper officer, to take poſſeſſion of and ſell all the ſaid deſcribed property of the defendant company under its execution, or ſo much thereof as may be neceſſary to ſatisfy complainant's judgment aforeſaid; that the Court may order, adjudge and decree that complainant has a firſt and prior lien upon all ſaid property, and that the attachment, or pretended attachment, made in ſaid cauſe of Charles D. McLure, Plaintiff, vs. Dia-

mond R Mining Company, Defendant, hereinbefore mentioned, is null and void and of no effect, or in any event has become lost and abandoned; that the judgment entered therein is void as to this complainant, or in any event has become satisfied; that the writ of execution therein be withheld; that the defendants herein, their officers, agents and servants, be restrained and enjoined from selling or disposing of in any manner whatsoever, under the said writ of execution issued in the above-mentioned action, any of the property herein described and set forth; and for such other and further relief as to the court may seem meet and equitable.

A. C. GORMLEY,
Solicitor for Complainant.

State of Montana,
County of Cascade,—ss.

R. S. Ford, being duly sworn, deposes and says that he is the president of the Great Falls National Bank, a corporation, the complainant herein and makes this verification for and on his behalf, that he has read the foregoing bill of complaint and knows the contents thereof, and that the matters and things therein stated are true, as he verily believes.

R. S. FORD.

Subscribed and sworn to before me this 23d day of February, 1907.

[Seal]

A. R. METTLER,

Notary Public, in and for Cascade County, Montana.

Due service of the foregoing bill of complaint, and receipt of a copy thereof, is hereby acknowledged at Great Falls, Cascade County, Montana, the principal place of business of the undersigned defendant in said action, this 23d day of February, 1907.

THE DIAMOND R MINING CO.

By W. P. WREN,

Secretary.

Exhibit "AA."

United States Marshal's Office,
District of Montana.

I do hereby certify that I have received the hereto annexed writ of attachment on the 14th day of December, A. D. 1901, and on the 16th day of December, A. D. 1901, at 9 o'clock A. M. executed the same by levying upon and attaching certain real estate hereinafter referred to, standing upon the records of Cascade County, State of Montana, in the name of the defendant mentioned in said writ, by filing with the County Clerk of said County of Cascade a copy of said writ, together with a notice that said property was attached, a copy of which notice is hereto attached and marked Exhibit "A," and by taking into

my custody, at two o'clock and twenty minutes P. M. of the 18th day of December, A. D. 1901, the following described personal property belonging to said defendant, and then and now situated and being in said Cascade County, to wit:

One kitchen range and cooking utensils; two kitchen tables; one refrigerator; one kitchen safe; three wardrobes; two chiffoniers; four iron bedsteads and bedding; three wood bedsteads and bedding; eighteen pillows; two lounges; one dining table; one dining side table; one dinner set dishes; table cutlery; carpets, and rugs; nine rooms; four roll-top desks; one typewriter desk; one No. 4 Smith Premier typewriter; five desk chairs; one bookkeeper's desk; one office clock; twenty-five chairs; one letter press and the further personal property described in a list thereof contained in Exhibit "B," hereto attached.

Dated this first day of January, A. D. 1902.

[Signed] J. P. WOOLMAN,
United States Marshal for the District of Montana.

Exhibit "A."

REAL PROPERTY.

One third interest in the Compromise Quartz Lode Mining Claim, Patent No. 1964.

The Moulton Quartz Lode Mining Claim, Patent No. 2471.

The South Carolina Quartz Lode Mining Claim, Patent No. 3253, (the Unity Quartz Lode Mining Claim, Patent No. 3253, all situated in Cascade County, Montana).

Lots, 1, 2, 3, 4, 5 and 15 of Block 2, of the Frisco Claim, Lots 1, 2, 3, 4, 5, 12, 13, 14, and 15, Block No. 3, of the Frisco Claim.

Lots 1 and 2, 34, 35 and 36, of Block No. 6, of the Frisco claim.

Certain vacated streets and alleys in the town of Neihart, Cascade County, Montana, more fully shown by deeds to L. S. McLure, dated June 9th, 1899, used for Concentrator site.

Two water rights on Belt Creek.

The tramway and rights of way for the same, between Moulton mine and Concentrator building.

The water flume and rights of way for same.

The Quartz Location, known as Belt No. 2. Concentrator building, power-house, and buildings at mine, and all machinery in all of the buildings aforesaid, including, engines, hoists etc. etc.

Office and household furniture, supplies, and monies and credits on hand.

Exhibit "B."**INVOICE OF LOOSE PROPERTY OF THE DIAMOND "R" MINING COMPANY. INVENTORY TAKEN DECEMBER 28th,**

[Here follows invoice, the printing of which is omitted by stipulation of counsel.]

[Endorsed]: No. 815. Title of Court and Cause. Complaint. Filed and Entered Feb. 25, 1907. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 1st day of April, 1907, demurrer was filed herein, which said demurrer is entered of final record as follows, to wit:

[Title of Court and Cause.]

Demurrer of Charles D. McLure.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said plaintiff's bill to be true in such manner and form as the same are therein set forth and alleged, demurs to the said bill and to the whole thereof, and for cause of demurrer shows:

1st. That enough does not appear upon the face of the bill to show the Court's jurisdiction of the suit.

2d. That said plaintiff has not shown by its said bill that it has any right or interest in the said properties therein described which would entitle it to the relief thereby prayed.

3d. That the facts and circumstances stated in said bill do not amount to a fraud.

4th. That the bill does not set out distinctly the particulars of the fraud alleged nor the manner in which the Court or the plaintiff herein was misled or imposed upon.

5th. That it appears upon the face of said bill that plaintiff has been guilty of laches and is not entitled to the relief prayed or to any relief in the premises.

6th. That said plaintiff has not in or by the said bill made or stated such cause as doth or ought to entitle it to any such recovery or relief as is thereby sought or prayed for from and against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in said bill this defendant demurs thereto and the whole thereof, and humbly demands the judgment of this Court whether he shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed with his costs and disbursements in this behalf most wrongfully sustained.

WIGHT & THOMPSON,
Solicitors for said Defendant.

State of Missouri,
City of St. Louis,—ss.

Charles D. McLure makes solemn oath and says, that he is the above-named defendant and that the foregoing demurrer is not imposed for delay and that the same is true in point of fact.

CHARLES D. McLURE,

Subscribed and sworn to before me this 22d day of March, A. D. 1907.

My term expires March 17, 1908.

[Seal]

JESSE B. MELLOR.

Notary Public in and for the City of St. Louis,
State of Missouri.

CERTIFICATE OF COUNSEL.

I do hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

IRA T. WIGHT,

Of Counsel for said Defendant:

[Endorsed]: Title of Court and Cause. Demurrer. Filed and Entered April 1, 1907. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to wit, on the 5th day of August, 1907, an order sustaining demurrer was made and entered herein as follows, to wit: [Here follows Order, the printing of which is omitted by stipulation of counsel.]

And thereafter, to wit, on the 6th day of August, 1907, a final decree was duly made and entered herein, which said decree is entered of final record herein as follows, to wit:

[Title of Court and Cause.]

Decree.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof it was ordered, adjudged and decreed as follows, viz:

That the complainant's bill of complaint be, and the same is hereby dismissed.

And it is further ordered, adjudged and decreed that defendant Charles D. McLure recover from complainant his costs in this behalf expended, assessed at the sum of \$20.65.

Done in open court this 6th day of August, 1907.

WILLIAM H. HUNT,

Judge.

[Endorsed]: Title of Court and Cause. Decree. Filed and Entered Aug. 6th, 1907. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

[The following order was omitted from the printed record pursuant to stipulation of counsel, but was afterwards printed at the request of Mr. Gormley.]

And thereafter, to wit, on the 7th day of August, 1907, an order allowing amendment to bill of complaint and order as to ruling on demurrer and as to decree was duly made and entered herein, as follows, to wit:

[Title of Court and Cause.]

Order Relative to Amendment to Complaint, Demurrer and Decree.

Now comes complainant and prays leave to amend its bill by inserting therein a paragraph No. 13, which amendment was by the Court allowed. Thereupon, by stipulation, it was agreed that the demurrer heretofore submitted to the Court should be deemed applicable to the complaint as amended.

Whereupon, the Court ordered that the decree heretofore entered stand as the decree in the case under the amended pleadings.

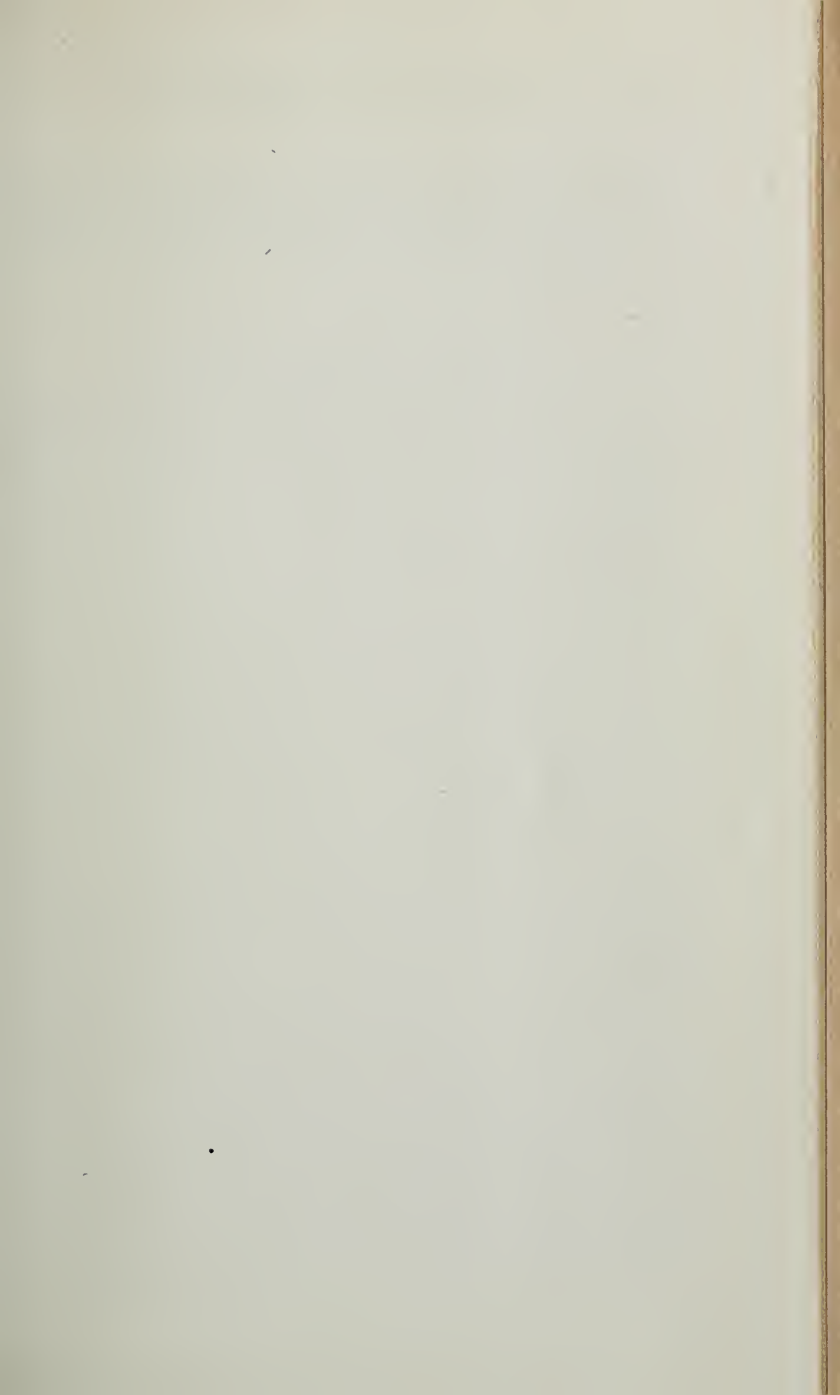
Entered August 7th, A. D. 1907.

GEORGE W. SPROULE,
Clerk.

Attest a true copy of minute entry.

[Seal] GEO. W. SPROULE,
Clerk.

By C. R. Garlow,
Deputy Clerk.



And thereafter, on August 7, 1907, the amendment to bill of complaint was filed, being as follows, to wit:

Amendment to Bill of Complaint.

13. That complainant's reasons for not commencing this action at an earlier date are as follows: The defendant C. D. McLure for a period of time beginning in the month of March, 1902, and ending in the month of April, 1906, made payments to the State Bank of Neihart aggregating several thousand dollars upon a loan of money made by said bank prior to the attachment suits hereinbefore mentioned, under the same circumstances and conditions, and for the same purpose as the loan made by the complainant and hereinbefore set forth; that said McLure also, in the year 1905, paid several small claims against the Diamond R Mining Company; that complainant was informed of the facts with reference to the payment of said money to said State Bank of Neihart by said McLure, and also the payment by him of the other claims aforesaid, and by reason thereof, when taken in connection with said McLure's promise to pay complainant the money due it, complainant was led to believe that said McLure would pay said debt, and waited for him to do so; that during said year 1905 parties representing the

said McLure came to complainant and made statements conveying the impression that there would be an adjustment of the affairs of said company, including complainant's said debt; that said McLure was without the State of Montana during all the times mentioned and complainant therefore waited for said McLure to come to Montana, to pay its said debt, as he had agreed, and also as the controlling stockholder of said Diamond R. Mining Company, to call a meeting of the stockholders to see what might be done to protect their interests; that said McLure did not come to Montana until the latter part of the year 1905, and did not come at all to Great Falls, the office of said company, or undertake in any way to adjust the affairs of said company, or complainant's said debt; that complainant desired and endeavored to give said McLure as well as said company, reasonable time and opportunity to adjust said indebtedness before instituting further proceedings, knowing at all times that complainant's delay was in no manner prejudicial to said McLure or said company, and complainant here alleges that no changes have taken place or circumstances arise that would make it inequitable to recognize at this time the rights of complainant as herein set forth, or that would prevent said parties meeting the issues raised as fully as though said action had been commenced at an earlier date.

[Endorsed]: Filed Aug. 7, 1907. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to wit, on the 7th day of August, 1907, complainant filed its petition for allowance of appeal herein, which said petition is in the words and figures following, to wit:

[Title of Court and Cause.]

Petition for Allowance of Appeal and Order Allowing Appeal, etc.

Great Falls National Bank, the above-named complainant, conceiving itself aggrieved by the order of August 5th, 1907, sustaining demurrer, and decree made and entered in the above-entitled cause on the 6th day of August, 1907, whereby, among other things, it was ordered that the defendant's demurrer to the bill of complaint herein be sustained, and it was further ordered, adjudged and decreed that said bill of complaint be and was thereby finally dismissed, does hereby petition for an order allowing it, the said complainant, to prosecute an appeal from said order of August 5th, 1907, sustaining demurrer to bill of complaint, and decree so made and entered on the 6th day of August, 1907, to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, for the reasons set

out in the assignment of errors herewith filed herein, and does hereby appeal from said final order and decree, and it prays that this appeal may be allowed, and that a transcript of the record and proceedings upon which said order and decree was made, duly authenticated, may be sent to said Circuit Court of Appeals for the Ninth Circuit, and also that an order may be made fixing the amount of security which the said complainant shall give upon such appeal.

GREAT FALLS NATIONAL BANK,

Complainant and Appellant,

By A. C. GORMLEY,

Its Solicitor.

Order.

The foregoing petition is granted, and the appeal prayed for allowed upon said petition giving a bond in the sum of three hundred dollars. It is ordered that a certified transcript of the record, proceedings and papers upon which the final order and decree of August 6, 1907, was rendered, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

WILLIAM H. HUNT,

Judge.

Done in open court this 7th day of August, 1907.

[Endorsed]: Title of Court and Cause. Petition and Order. Filed Aug. 7, 1907. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 7th day of August, A. D. 1907, the complainant filed its assignment of errors herein, being in the words and figures following, to wit:

[Title of Court and Cause.]

Assignment of Errors.

Now comes the Great Falls National Bank, complainant, in the above-entitled cause, by its solicitor, and says that in the order of August 5th, 1907, and decree in said cause, entered on the 6th day of August, 1907, and in the record and proceedings therein, there is manifest error, and he files the following assignment of errors, committed or happening in said cause, and upon which it will rely on its appeal from said order and decree:

1. The Court erred in its order of August 5th, 1907, in sustaining defendants' demurrer to complainant's bill of complaint in this, that the said demurrer should have been overruled.

2. The Court erred in its said decree of August 6, 1907, in finally dismissing said bill of complaint, in that (a) the said bill of complaint set forth facts showing that the attachment of the defendant, C. D. McLure, was sought and made for the purpose of hindering, delaying and defrauding the creditors of the Diamond R. Mining Company, and particularly the complainant herein, and was therefore void.

(b) The said bill of complaint further set forth facts showing that whatever lien the said C. D. McLure may have acquired by virtue of said attachment, was waived, abandoned and lost by reason of his unreasonable delay and laches in having issued out of said court a writ of execution for the sale of the property upon which he claimed an attachment lien, and the rights of the said C. D. McLure thereby became subject and subordinate to the attachment lien of the complainant herein, and (c), the said bill of complaint set forth facts showing that the complainant was entitled to the equitable relief prayed for.

Wherefore the said complainant prays that said order of Aug. 5, 1907, and decree of August 6, 1907, be reversed, set aside and held for naught, and that said Circuit Court be directed to overrule defendants' demurrer to said bill of complaint, and to hear and determine said cause.

A. C. GORMLEY,

Solicitor for Great Falls National Bank, Complainant and Appellant.

[Endorsed]: Title of Court and Cause. Assignment of Errors. Filed Aug. 7, 1907. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 8th day of August, 1907, the complainant filed its bond on appeal herein, which said bond is in the words and figures following, to wit:

[Title of Court and Cause.]

Bond on Appeal.

Know All Men by These Presents, that we, Great Falls National Bank, a corporation, as principal, and R. S. Ford and R. P. Reckards, as sureties, of the County of Cascade, State of Montana, are held and firmly bound unto the above-named defendants jointly and severally in the sum of three hundred dollars (\$300.00), to be paid to them, or any of them, for the payment of which well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated the 7th day of August, 1907.

Whereas, the said Great Falls National Bank has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the final order and decree made and entered in the above-entitled cause on the 6th day of August, 1907, by the Circuit Court of the United States for the District of Montana:

Now, therefore, the condition of this obligation is such that if the above-named Great Falls National Bank shall prosecute its appeal to effect and answer all costs if it fail to make its said plea good, then this obligation to be void, but otherwise to remain in full force and virtue.

GREAT FALLS NATIONAL BANK,

By R. S. FORD, President.

R. S. FORD, [Seal]

R. P. RECKARDS. [Seal]

The foregoing bond is approved by me under order of Court.

GEO. W. SPROULE,

Clerk U. S. Circuit Court for the District of Montana.

State of Montana,
County of Cascade,—ss.

R. S. Ford and R. P. Reckards, being severally duly sworn, each for himself, deposes that he is one of the sureties named in the foregoing bond, and that he is worth six hundred dollars over and above his just debts and liabilities and property exempt from execution, and that he is a resident and freeholder within the State of Montana.

R. S. FORD.

R. P. RECKARDS.

Subscribed and sworn to before me this 7th day of August, 1907.

[Seal] A. R. METTLER,
Notary Public in and for Cascade County, Mon-
tana.

[Endorsed]: Title of Court and Cause. Bond on Appeal and Approval Thereof. Filed Aug. 8, 1907. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to wit, on the 7th day of August, A. D. 1907, a citation was duly issued herein, being in the words and figures following, to wit:

Citation (Original).

The President of the United States of America, to Charles D. McLure, Diamond R. Mining Company, a Corporation, and A. W. Merrifield, United States Marshal for the District of Montana, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 7th day of September, A. D. 1907, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States, Ninth Circuit, District of Montana, wherein Great Falls National Bank, a corporation, is appel-

lant, and Charles D. McLure, Diamond R. Mining Company, a corporation, and A. W. Merrifield, United States Marshal for the District of Montana, are appellees; to show cause of any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable WILLIAM H. HUNT, United States District Judge for the District of Montana, this 7th day of August, A. D. 1907.

WILLIAM H. HUNT,

Judge.

Due service of the above and foregoing citation admitted by copy this 7th day of August, A. D. 1907.

IRA T. WIGHT,

Attorney for Appellees.

Filed Aug. 8th, 1907. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

Clerk's Certificate to Transcript of Record.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States Circuit Court, Ninth Circuit, District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 52

pages, numbered consecutively from 1 to 52, is a true and correct transcript of the pleadings, orders, decree, opinion, and all proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said court in my possession; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of twenty-four 85/100 dollars (\$24.85/100), and have been paid by the appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, at Helena, Montana, this 27th day of August, A. D. 1907.

[Seal]

GEO. W. SPROULE,
Clerk.

[Endorsed]: No. 1496. United States Circuit Court of Appeals, for the Ninth Circuit. The Great Falls National Bank, a Corporation, Appellant, vs. Charles D. McLure, The Diamond R. Mining Company, a Corporation, and A. W. Merrifield, United States Marshal for the District of Montana, Appellees. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Montana.

Filed August 31, 1907.

F. D. MONCKTON,
Clerk.